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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JONES, Defendant and Appellant.	C083368 (Super. Ct. No. 15F05868)

After forcing his way into N.'s home, defendant Anthony Jones held her and her three-year-old son at gunpoint, threatening to shoot them both if N. did not lock the boy in the bathroom. After she did so, defendant committed several forcible sexual acts[1] with

[1] Throughout this opinion, we use the term "forcible" as shorthand for a sex crime committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury. (See, e.g., Pen. Code, §§ 261, subd. (a)(2), 288a, subd. (c)(2)(A), 289, subd. (a)(1).)

N. against her will while capturing images of certain acts on video with his cell phone. When N.'s husband came home for lunch, defendant ordered him into the bathroom at gunpoint. He then took a final video of N. with his cell phone before allowing her to join her family in the bathroom, saying he would shoot them all if they called the police. When they emerged several minutes later, defendant was gone.

Defendant was convicted by jury of three counts of forcible oral copulation (Counts 1, 2, and 5), one count of forcible sexual penetration (Count 3), two counts of forcible rape (Counts 4 and 6), one count of first degree burglary (Count 7), one count of assault with intent to commit rape during a first degree burglary (Count 8), two counts of sexual battery (Counts 9 and 10), one count of making a criminal threat (Count 11), three counts of assault with a deadly weapon (Counts 12 through 14), one count of child abuse (Count 15), and two counts of false imprisonment (Counts 16 and 17). With respect to the forcible sex offenses, the jury also found defendant was armed with and personally used a deadly weapon, and he committed these offenses during the commission of a first degree burglary. With respect to the assault with intent to commit rape, the jury found defendant was armed with a deadly weapon. The trial court sentenced defendant to state prison for an aggregate determinate term of 41 years consecutive to an aggregate indeterminate term of 150 years to life.

On appeal, defendant contends four evidentiary errors require reversal of his convictions. Specifically, he claims the trial court prejudicially abused its discretion and violated his federal constitutional rights by: (1) allowing the prosecutor, during cross-examination, to elicit from defendant a denial of homelessness solely to impeach him regarding that collateral matter; (2) admitting into evidence testimony that defendant's cell phone contained hundreds of pornographic images and videos; (3) admitting into evidence an irrelevant and unduly prejudicial photograph of N.'s three-year-old son; and

(4) admitting into evidence prejudicial testimony from N. concerning how she was impacted by the crimes committed against her.

We conclude each of these evidentiary claims lacks merit. The challenged evidence was relevant and not rendered inadmissible by Evidence Code section 352.[2] For this reason, admission of the evidence did not violate defendant's federal constitutional rights.

Finally, we sought supplemental briefing on a sentencing matter, specifically, whether or not the trial court erred in imposing full-term consecutive sentences for the forcible sex offenses (Counts 1 through 6) under Penal Code section 667.6, subdivision (d). Having reviewed the parties' submissions, we conclude four of the six forcible sex offenses were not committed on "separate occasions," and therefore the trial court erred in imposing mandatory full-term consecutive sentences for those convictions under Penal Code section 667.6, subdivision (d). However, because the trial court also indicated it would have imposed such sentences under subdivision (c) of this section, providing a trial court with discretion to impose such sentences when the crimes are committed "on the same occasion," there is no need to remand the matter for a new sentencing hearing.

FACTS

In September 2015, N. lived with her husband, V., and their three year-old son in the South Natomas area of Sacramento. The family had recently moved to the United States from India. On a typical weekday, V. would drop his son off at the South Natomas Community Center for preschool before going to work. N. stayed home during the morning and would walk to the community center to pick the boy up when preschool

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[2] Undesignated statutory references are to the Evidence Code.

ended at 11:30 a.m. The two would then walk home. Their apartment was about a mile from the community center. When they got home, N. would make lunch while the boy played. Around 1:00 p.m., V. would come home to have lunch with his family.

During this month, N. came into contact with defendant two or three times at the community center while picking her son up from preschool. At first, the interactions were innocuous. On one of these occasions, defendant was sitting at a table reading and said to N., "a lot of silence today." When the children were let out of preschool a moment later, defendant remarked there was "no more silence." N. agreed and walked away with her son. Less innocuous was an interaction N. had with defendant about a week before the crimes committed in this case. Defendant was sitting on some stairs outside her apartment when she and her son got home from preschool. Defendant said he lost his dog and asked whether she had seen it. N. said she had not and went inside the apartment with her son. Defendant then knocked on the door. N. opened the door a couple inches to see what he wanted. Defendant again asked whether N. had seen his dog. When N. repeated that she had not, he asked whether her neighbors had seen it. N. answered, "how would I know if my neighbor had seen it or not?" Defendant then asked her to look at a picture of the dog on his cell phone. N. thought something was wrong when she noticed "his hands were shaking a lot," so she closed and locked the door.

On September 21, like any other weekday, N. picked her son up from preschool and the two walked home, arriving at the apartment around noon. N. opened the door and followed her son inside. As she did so, defendant appeared and forced his way into the apartment behind her. N. grabbed him and yelled. She was "very scared." Defendant told her to stop yelling, adding that he had a gun and would shoot her and her

child. At this point, N. noticed he was holding a semi-automatic handgun and stayed quiet.[3]

Defendant closed and locked the door and directed N. to bring her son to the bedroom while he followed. Defendant then told her to lock the boy in the bathroom. N. initially refused. Defendant again threatened to shoot her. When she repeated her refusal several times, defendant "continuously kept saying that, you listen to me, otherwise I will shoot." He then racked the slide on the handgun, indicating he was loading a round in the chamber. This prompted N. to comply with his demand and she put her son in the bathroom, telling the boy: "Don't come out. Mom will be right back."

When N. emerged from the bathroom alone, defendant told her to close the blinds in the living room and sit on the couch. N. complied with this demand as well. Defendant then asked what time her husband came home, and after receiving the answer, told her, "you lied about my dog." N. responded: "I have already told you I have not seen any dog." Defendant then asked what she would do to ensure the safety of her child. N. told him to take whatever he wanted from the apartment and leave. Defendant told her to take off her clothes. N. initially refused. Defendant said: "I'm going to shoot your son." At this point, as N. explained during her testimony at trial, she "got very scared" and said, "no, no, no, I'll do it. Don't do anything to my child." She then took off her clothes.

Defendant began taking either photographs or videos of N.'s body with his cell phone. He then touched her breasts and hips with his hands, sucked on her breasts, and kissed her before pulling his pants halfway down and telling her to orally copulate him.

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[3] While N. testified to knowing nothing about guns, when interviewed by police following the crimes, she was shown pictures of a revolver and a semi-automatic handgun and identified the gun defendant used as having been the latter.

N. complied with this demand, supporting one count of forcible oral copulation (Count 1). Then, at defendant's direction, N. lay down on the couch and defendant orally copulated her, supporting a second count of forcible oral copulation (Count 2). While still on the couch, defendant put his fingers inside N.'s vagina, supporting one count of forcible sexual penetration (Count 3). Defendant then inserted his penis inside her vagina and engaged in sexual intercourse with her, supporting one count of forcible rape (Count 4). While defendant raped N., he told her she was "gay" and that it was her husband's fault he was raping her, adding that her husband "refused something" and he was "taking revenge." N. did not understand what he meant by this.

N. could not estimate how long defendant raped her the first time, but at some point he stopped, told her to stand up, and took more pictures of her with his cell phone. N. then acceded to another demand to orally copulate him, supporting a third count of forcible oral copulation (Count 5). After N. did so, defendant said he was "not enjoying" the position in which he had been raping her and told her to bend over the couch. N. again complied. Defendant then had sex with her in that position, supporting a second count of forcible rape (Count 6). N. testified that defendant made her orally copulate him once more and raped her two more times in different positions, although these acts were not charged against him. While defendant was raping her the last time, he told her: "I have a very big gang, so don't go to the police, and if you go to the police, even if you leave Sacramento, I will find you from anywhere, and I'll shoot your whole family." Defendant then indicated he was having difficulty ejaculating and wanted her to tell him she wanted him to give her a baby. N. initially refused, but ultimately did as he said, wanting the ordeal to be over.

N.'s husband came home for lunch at 12:40 p.m. N. was looking at the clock as he unlocked the door, hoping he would "come home early so that he could save [her] from [defendant]." Defendant got up and went into the kitchen before V. entered the

apartment. N., still naked on the couch, told V. in Hindi, "go away, he has a gun." Defendant told N. to "let him come" and emerged from the kitchen pointing the gun at V. Still in Hindi, V. asked N. where their son was. N. answered and told her husband to call 911. When V. pulled out his cell phone to do so, defendant told him to put the phone down on the counter, adding: "I will shoot you." V. put the phone down and then complied with defendant's demand that he join his son in the bathroom.

Defendant took more photos and videos of N. with his cell phone, telling her to promise to help defendant finish before her husband came home the next time he came over. N. complied. A video introduced into evidence depicts N. saying: "Next time I finish fast before my husband came." After taking this video, defendant allowed N. to dress and join her family in the bathroom. He then said he would shoot them all if they called the police. Several minutes later, when the apartment had been quiet for awhile, they emerged from the bathroom and defendant was gone.

In addition to the forcible sex offenses set forth above (Counts 1-6), the foregoing facts, testified to by N., supported one count of first degree burglary (Count 7), one count of assault with intent to commit rape during a first degree burglary (Count 8), two counts of sexual battery (Counts 9 and 10), one count of making a criminal threat (Count 11), three counts of assault with a deadly weapon (Counts 12 through 14), one count of child abuse (Count 15), and two counts of false imprisonment (Counts 16 and 17). Because N.'s testimony alone is more than sufficient to support these crimes, we dispense with a detailed recitation of the additional evidence adduced against defendant at trial. We do note V. also testified and largely corroborated his wife's account of what transpired after he got home for lunch. We also note defendant's cell phone was searched following his arrest and was found to contain six video clips of N. performing various sexual acts with him. These videos were admitted into evidence and played for the jury.

Finally, we note defendant testified in his own defense. He denied each of the charges against him and claimed he and N. met at the community center and became close during the span of a few weeks. During this time, they discussed the "possibility of having sex." On the day in question, according to defendant, N. invited him over and they engaged in consensual sexual activity, during which he took the videos shown to the jury. When V. came home, defendant ran into the kitchen and got dressed. He denied having a gun "at any point," and claimed that as he left the apartment, his cell phone accidentally took the final video of N., in which she said she would "finish fast" the next time he came over. The jury obviously did not believe defendant's testimony.

Specific items of evidence challenged in this appeal will be discussed in greater detail in the discussion portion of the opinion, to which we now turn.

DISCUSSION

I

Impeachment on a Collateral Matter

Defendant contends the trial court prejudicially abused its discretion and violated his federal constitutional rights by allowing the prosecutor, during cross-examination, to elicit from him a denial of homelessness solely to impeach him regarding that collateral matter. We disagree.

A.

Additional Background

Defendant was homeless when he committed the crimes involved in this case. Nevertheless, during his direct testimony, defendant claimed he was "living at [an] apartment complex on San Juan" and was going to the community center to, as he put it, "work on my book and to pull together my research and to hang out with friends, colleagues." During cross-examination, after defendant stated N. was attracted to him

because she liked "[c]lean-shaven men who were well-spoken and well -- knowledgeable," the following exchange took place:

"[Prosecutor:] You mentioned that you lived on San Juan; is that correct?

"[Defendant:] Yes.

"[Prosecutor:] Isn't it true . . . that you were homeless?

"[Defendant:] No.

"[Prosecutor:] So you did not tell Detective Krutz that you were living and sleeping on the streets?

"[Defendant:] No.

"[Prosecutor:] Do you know that your interview with Detective Krutz was recorded?

"[Defendant:] Yes, I do.

"[Prosecutor:] Okay. So I am going to refer you to the first page of the 107-page transcript regarding your interview with Detective Krutz, and I am going to start at line 18 here, where Detective Krutz says:

"Where do you sleep?

"Your answer is:

"The street.

"[Defendant:] Uh-huh.

"[Prosecutor:] His question is:

"Where?

"Your answer is:

"Parks.

"He asks:

"Where? Come on. Everybody's got a favorite.

"Your answer:

"Not me.

"His question:

"Every homeless guy I talk to has a favorite.

"You answer:

"Not me. They all seem the same to me.

"Correct?

"[Defendant:] Yes.

"[Prosecutor:] So is that a lie to Detective Krutz?

"[Defendant:] No.

"[Prosecutor:] So I'm a little confused. You're sleeping on the street or you have . . . a home? What's the deal?"

Defendant then testified he did not mean "the street" literally when he spoke to the detective, but was using it more as "a slang term," meaning that while he had a home, he was an insomniac, partied a lot, and was "always at someone else's house," adding: "Different friends, different lovers."

The prosecutor then asked: "Isn't it true that in your statement to Detective Krutz, you specifically talked about sleeping on the playground equipment of the Natomas Community Center because you were homeless?" Defendant answered: "No. I believe I said I was -- I stay at the park late nights and early mornings because I'm an insomniac."

Over defense counsel's objection, the prosecutor was then allowed to question defendant concerning 19 trespass citations issued to him in the South Natomas area.

B.

Analysis

Section 780 provides generally that "the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited

to any of the following: [¶] . . . [¶] (h) A statement made by [the witness] that is inconsistent with any part of his [or her] testimony at the hearing." Where, as here, the witness is given an opportunity to explain or deny the inconsistent statement (see § 770, subd. (a)), evidence of such a statement is "admissible to prove [its] substance as well as to impeach the declarant." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.)

Nevertheless, in arguing the trial court abused its discretion in allowing the prosecutor to impeach defendant with his prior admission to being homeless, as well as the trespass citations, defendant relies on the following rule: "A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations.] This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) Reliance on this rule is misplaced because the "testimony that the prosecution sought to contradict was elicited on direct, not cross-examination." (*People v. Mayfield* (1997) 14 Cal.4th 668, 748, abrogated on another point in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) It was on direct examination that defendant claimed he was "living at [an] apartment complex on San Juan." The prosecutor sought to contradict this testimony with defendant's prior inconsistent statements to Detective Krutz admitting to being homeless and the trespass citations.

Nor did the trial court abuse its discretion under section 352 in allowing such impeachment. Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." This provision "permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption," but also "requires that the

danger of these evils substantially outweigh the probative value of the evidence." (*People v. Lavergne, supra*, 4 Cal.3d at p. 744; *People v. Tran* (2011) 51 Cal.4th 1040, 1047.)

Here, not only was this challenged evidence relevant to defendant's credibility in general, but the fact defendant was homeless also tended in reason to make it less likely his specific story that he and N. were involved in a consensual sexual relationship was true. The probative value was therefore significant. In determining whether the evidence should nevertheless have been excluded under section 352, we first note exclusion is warranted under this provision only if the probative value is "substantially outweighed" by the danger of undue prejudice or one of section 352's other statutory counterweights. (§ 352.) We also note "that ' "[t]he prejudice which exclusion of evidence under . . . section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*.' " [Citations.]' [Citation.]" (*People v. Holford* (2012) 203 Cal.App.4th 155, 167, italics added.) Here, "[b]ecause the [challenged evidence] could have assisted the jurors in evaluating defendant's testimony, and because it presented minimal risks of undue prejudice to defendant, the trial court committed no error in allowing its admission for purposes of impeachment." (*People v. Mayfield, supra*, 14 Cal.4th at p. 748.)[4]

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[4] Defendant does not offer a specific argument concerning section 352's other statutory counterweights, i.e., undue time consumption, confusion of the issues, or misleading the jury. Any such argument is therefore forfeited. In any event, we would also conclude the significant probative value of this impeachment evidence was not

Having concluded the evidence was admissible under section 352, "we must also reject defendant's argument that he was deprived of his constitutional right to a fair trial. ' "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." ' [Citations.]" (*People v. Holford*, *supra*, 203 Cal.App.4th at p. 180.)

II

Admission of Pornography Evidence

Defendant claims the trial court prejudicially abused its discretion and violated his federal constitutional rights by admitting into evidence testimony that (1) his cell phone contained hundreds of pornographic images and videos, and (2) his internet search history included searches for pornography depicting Indian women. Not so.

A.

Additional Background

Defendant moved in limine to exclude any evidence of pornography found on his cell phone. At the hearing on the motion, the prosecution argued defendant's internet searches for pornography depicting Indian women was relevant and highly probative of his sexual interest in women of that ethnicity, such as N. Noting defendant had also searched for other types of pornography, the defense argued admitting this evidence would give the jury "the wrong idea that that's all that he was looking for" and added, "it's just not necessary to the relevance of the charge." The prosecutor responded: "You know, I think the way to get around that then is to talk about all of the porn that was on

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substantially outweighed by the amount of time needed to present it. Nor would the evidence have misled the jury or caused it to be confused as to the issues before it. Indeed, defendant was the one seeking to mislead the jury by presenting himself as a gentleman and a scholar who was using the community center to work on his book and confer with colleagues.

his phone. I mean, pornography by itself is not all that prejudicial. It's very common that a lot of people in their everyday lives watch pornography, research pornography. So I don't have any problem with bringing in the various types of pornography so that it doesn't necessarily pinpoint, but certainly it is absolutely relevant in terms of who his victim was in this case." Defense counsel then argued any evidence of pornography on defendant's cell phone would be "far too prejudicial than probative in this particular case."

After taking the matter under submission, the trial court ruled the evidence was "relevant and probative and not unduly prejudicial," adding: "There are other searches, other evidence on the cell phone of a sexual nature that the defendant wanted to also introduce to have a complete record of what it was, and I'm allowing that as well."

In accordance with this ruling, a detective testified that in addition to the six video files of N. found on defendant's cell phone, the phone contained nearly 700 pornographic video files and several hundred pornographic image files. The detective explained, "there was quite a bit of interracial-themed pornography" and "a bunch of other random sexually explicit materials," including "some Asian animation type of pornography." Asked specifically about "East Indian women," the detective answered: "There were a couple of images. It's hard to tell exactly, but they appeared to be, but I can't say a hundred percent for sure unless I knew who the particular performer was in that video clip." The prosecutor then asked the detective whether he found defendant's internet search history included searches for East Indian pornography. The detective answered: "Yes, I did." The detective then confirmed some of the search terms, including: "Hard Core Indian Sex Videos," "All Indian Sex Videos," and "Free Indian Sex Scandals."

B.

Analysis

"Except as otherwise provided by statute, all relevant evidence is admissible." (§ 351.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) However, as already mentioned, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

Here, evidence of defendant's internet searches for Indian pornography tended in reason to prove his sexual interest in women of that ethnicity. In turn, that sexual interest tended to establish his intent when he forcibly entered N.'s apartment the day of the sexual assaults. (See, e.g., *People v. Memro* (1995) 11 Cal.4th 786, 864-865 [possession of child pornography was evidence of the defendant's intent to molest child victim].) With respect to undue prejudice, we again note section 352 uses the term "prejudice" not to mean damaging. Rather, the prejudice this provision is designed to avoid is that which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. " 'In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.) Evidence that defendant watched pornography would not have so inflamed the jury.

Accordingly, we conclude the trial court did not abuse its discretion in finding the evidence was both relevant and admissible under section 352. Again, this conclusion also requires our rejection of defendant's assertion of federal constitutional error. (See *People v. Holford, supra,* 203 Cal.App.4th at p. 180.)

III

Admission of a Photograph of N.'s Son

Defendant asserts the trial court prejudicially abused its discretion and violated his federal constitutional rights by admitting into evidence an irrelevant and unduly prejudicial photograph of N.'s three-year-old son.

The photograph was admitted into evidence to demonstrate the boy's appearance and corroborate N.'s testimony that he was in fact a child when defendant committed the crimes, one of which was child abuse. Defendant argues it was not relevant for these purposes because there was no dispute as to the boy's status as a child. We are not persuaded. Indeed, similar arguments have been advanced and rejected by our Supreme Court regarding photographs of murder victims where there is no dispute as to the cause of death; such photographs illustrate and corroborate the testimony of prosecution witnesses regarding the circumstances of the crime. (See *People v. Heard* (2003) 31 Cal.4th 946, 973-974; *People v. Lewis* (2001) 25 Cal.4th 610, 641; *People v. Scheid* (1997) 16 Cal.4th 1, 15; *People v. Pride* (1992) 3 Cal.4th 195, 243.) "The circumstance that defendant did not challenge the prosecution's theory that the attack upon [the victim] was a vicious one 'does not render victim photographs irrelevant.' [Citation.]" (*People v. Heard, supra,* 31 Cal.4th at p. 974.) Similarly, here, the fact defendant did not challenge N.'s testimony that her son was a child does not make a corroborative photograph of him irrelevant.

Defendant also argues the photograph was unduly prejudicial because it "posed an unacceptable risk of unfairly convincing the jurors to tip the balance in favor of

conviction based on the sympathetic portrayal of the toddler rather than on the strength of the prosecution's case." Again, we note similar arguments have been made with respect to crime scene photographs, where the defendant argues such photographs are unduly prejudicial because their gruesome nature risks creating undue sympathy for the murder victim. " 'The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]' [Citation.]" (*People v. Heard*, *supra*, 36 Cal.4th at p. 976.) The fact that such photographs are "graphic and unpleasant to consider does not render [their admission into evidence] unduly prejudicial." (*Ibid.*) Similarly, here, the fact that the picture of N.'s son depicted a toddler does not render its admission unduly prejudicial.

Again, the challenged evidence was both relevant and admissible under section 352. Nor did its admission violate defendant's federal constitutional rights. (See *People v. Holford*, *supra*, 203 Cal.App.4th at p. 180.)

IV

Admission of Victim-impact Evidence

Defendant's final contention is the trial court prejudicially abused its discretion and violated his federal constitutional rights by admitting into evidence prejudicial testimony from N. concerning how she was impacted by the crimes committed against her.

A.

Additional Background

N. testified she went to the hospital the day after defendant raped and sexually assaulted her to get tested for HIV and other sexually transmitted diseases. When the prosecutor asked whether she was given any medications, N. testified: "I was given the

medicine for infections. I was given the medicine for pregnancy control." When the prosecutor asked how the medication made N. feel, defense counsel objected on relevance grounds. After a discussion at sidebar, the objection was overruled and N. answered: "Half an hour later, I threw up." In response to further questioning, N. clarified it was the emergency contraception medication that caused her to vomit. She went back to the same doctor the following day and was given the same medication to take again. It was during that visit that she was also given HIV medication. When the prosecutor asked how the latter medication made her feel, defense counsel responded: "Same objection, Your Honor." This objection was also overruled and N. answered: "My body became very weak, and after taking the medication, you know, my body would shiver a lot, and whole time, I would feel very dizzy." The prosecutor then asked how long N. took that medication. N. answered: "I don't remember exactly, but I think I took it for eight or ten days."

Later during N.'s direct examination, the prosecutor asked how the incident affected her life. Defense counsel again objected on relevance grounds. The trial court asked: "Does this go to what we talked about earlier?" Defense counsel answered: "Yes, it does." The objection was overruled and N. answered: "This incident has ruined my life. Even till today, I have not been able to take this incident out of my mind. I am here today because of my husband and my son. Otherwise, I would have finished my life a long time ago. [¶] Now when I get out, I am so scared. I don't even talk to any stranger. Even if I bring [my son] home from school, I, you know, quickly close my door. Even now also, you know, I get so scared when I close my -- the door of my own house." After this response, the trial court instructed the jury "not to consider this last answer for the purposes of sympathy or prejudice," adding: "It's not to influence your decision regarding sympathy for this witness. The purpose of that last answer is in response to the defense[] argument that this was consensual."

During V.'s testimony, he testified the family moved into a new apartment and eventually out of California after the crimes committed in this case. As he explained the reason for the move: "Primarily because of this incident only, because my wife [N.], earlier she was -- she didn't get to sleep for at least for one month. She used to take sleeping pills, also. [¶] Slowly and gradually she started getting sleep, but her mental condition was not right. She used to think about the incident on daily basis. Every day. Every hour kind of thing. [¶] She used to feel very terrified whenever she come inside the house, although it's a new apartment. She was very terrified." There was no objection to this testimony. Nevertheless, the trial court gave the jury another limiting instruction: "You are to consider this testimony given by the witness just now for the purposes of consent, and not for any other purpose and certainly not for any sympathy for the victim."

Following V.'s testimony, after the jury left the courtroom, the trial court summarized the sidebar discussion that occurred during N.'s testimony: "[T]here were several times where [N.] was asked by the prosecution questions like what -- a line of questioning about medication that was taken after the incident. [¶] Specifically I believe it was Plan B type medication and also questions about HIV medication that made her feel nauseated, that she continued to take for about eight to ten days, and then she stopped taking, and the reason offered at the sidebar was that this goes to the issue of consent. In other words, why would she -- if this was consensual sex, why would she continue to take HIV medication that made her feel sick. And that would certainly go against consent. [¶] I allowed counsel to elaborate further on the purpose for that evidence. I don't want to misinterpret it. The defense felt that that evidence was irrelevant. [¶] There was also a question asked of the complaining witness about -- toward the end of her testimony about how -- basically how did this event make her feel, and she gave some detailed testimony on that. Counsel objected. I also anticipated the reason that question was asked was regarding consent." The trial court also explained defense counsel had argued consent

during the defense's opening statement to the jury and that such a defense was supported by the "video that was testified to by [N.] in which she said words to the effect of, you know, finish faster next time before my husband comes home." The court concluded: "So I think the need for the kind of inquiries that were made by the People of this witness on direct examination were reasonable, probative and necessary because of the issues regarding consent. [¶] There may be a more artful way to instruct the jury as to the limited purpose for that testimony, and I'm certainly open to suggestion on that, but the probative value is not outweighed by the substantial likelihood or the probability -- or the likelihood that such evidence would mislead the jury or that it would be unfairly prejudicial to the defense in this particular case, given the nature of the evidence I have just summarized."

Defense counsel did not request any further instruction on the issue and instead stated for the record: "I am still maintaining the objections, Your Honor, as to relevance and actually speculation. [¶] Consent, to me, is very fluid. We would have to speculate to decide how one responds to it. And so I don't think a limiting instruction is gonna take back what the testimony would say, and I still think that it should be kept out under 352."

B.

Analysis

We first note the Attorney General argues defendant has forfeited this claim for failing to object below on the same grounds raised in this appeal. We carefully delimit defendant's claim to that raised below and reject it.

"Section 353 provides in pertinent part, 'A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear*

the specific ground of the objection or motion. . . . .' [Citation.] In accord with this statute, our high court has consistently held that a ' " 'defendant's failure to make a timely and *specific* objection' on the ground asserted on appeal makes that ground not cognizable. [Citation.]" ' [Citation.] ' "The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal." ' [Citation.] ' "[T]he objection must be made in such a way as to alert the trial court to the . . . basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." [Citation.] What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of *the specific reason or reasons* the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. *A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.*' [Citation.]" (*People v. Holford*, *supra*, 202 Cal.App.4th at pp. 168-169.)

Here, as indicated, defendant objected to the admission of N.'s testimony concerning how the emergency contraception and HIV medications physically affected her and how the incident affected her life on relevance grounds, adding, "speculation" to the objection following the trial court's description of the sidebar discussion. While the trial court, in this description, did not indicate defense counsel also objected on section 352 grounds, it nevertheless conducted such an analysis and ruled the evidence was

relevant to the issue of consent, and its probative value for this purpose was not substantially outweighed by any of the section 352 counterweights. Defense counsel did not object to V.'s testimony regarding how the incident affected his wife. Defendant argues he is merely reraising his relevance claim, specifically that "[v]ictim-impact evidence is irrelevant and inadmissible in a capital or non-capital guilt trial." However, the cases he cites in support of this claim do not hold evidence of how a crime affects a victim is never relevant in the guilt phase of a trial. For example, he cites *People v. Stansbury* (1993) 4 Cal.4th 1017 (*Stansbury*) for the proposition that "an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*Id*. at p. 1057, reversed on another ground in *Stansbury v. California* (1994) 511 U.S. 318.) However, *Stansbury* held the prosecutor committed prosecutorial misconduct when, in argument to the jury during the guilt phase of the trial, he urged the jurors to imagine the victim's feelings. (*Id*. at pp. 1056-1057; see also *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250; *People v. Fields* (1983) 35 Cal.3d 329, 362.) Such an argument was not made in this case. And while we agree evidence of a victim's feelings is likewise not admissible *for purposes of creating sympathy for the victim* during the guilt phase of a trial, here, the challenged evidence was not admitted for that purpose, as the trial court specifically instructed the jury. It was instead admitted to establish N. did not consent to engaging in the sex acts with defendant. We conclude the trial court correctly determined it was relevant and admissible for that purpose.

There was neither an abuse of discretion nor a violation of defendant's federal constitutional rights.

V

Full-term Consecutive Sentencing

As mentioned, we sought supplemental briefing on the question of whether or not the trial court erred in imposing mandatory full-term consecutive sentences for Counts 1

through 6 under Penal Code section 667.6, subdivision (d). We conclude there was error with respect to four of these counts. However, because the trial court also indicated it would have exercised its discretion in imposing such sentences under subdivision (c) of this section, there is no need to remand the matter for a new sentencing hearing.

The trial court, in imposing full-term consecutive sentences on these counts, indicated it was doing so under Penal Code section 667.6, subdivision (c), but also stated such sentences were "mandatory." Because subdivision (d) of this section is the subdivision providing for mandatory imposition of such sentences, we conclude the trial court simply misspoke when it indicated it was utilizing subdivision (c). This conclusion is bolstered by the trial court's finding that "each of the crimes charged in Counts 1 through 6 were separate and discrete acts for purposes of imposing consecutive sentencing." As we explain immediately below, this is the test for imposing such sentences under subdivision (d), not subdivision (c).

Penal Code section 667.6, subdivision (d), provides in relevant part: "A full, separate, and consecutive term shall be served for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (Pen. Code, § 667.6, subd. (d).)

"Once a trial judge has found under [this subdivision] that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could

have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his [or her] assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092 (*Garza*).)

"[A] finding of 'separate occasions' under Penal Code section 667.6 does not require a change in location or an obvious break in the perpetrator's behavior: '[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.' [Citation.]" (*People v. Jones* (2001) 25 Cal.4th 98, 104.) For example, in *Garza*, *supra*, 107 Cal.App.4th 1081, we held the trial court could reasonably have concluded three forcible sex offenses occurred on "separate occasions" even though each was committed against the victim while in a parked car during the span of several minutes. (*Id*. at p. 1092.) We explained: "After defendant forced the victim to orally copulate him, he let go of her neck, ordered her to strip, punched her in the eye, put his gun to her head and threatened to shoot her, and stripped along with her. That sequence of events afforded him ample opportunity to reflect on his actions and stop his sexual assault, but he nevertheless resumed it. Thus, defendant's first act of rape was committed on a separate occasion from the forcible oral copulations. [Citation.] [¶] Similarly, defendant had an adequate opportunity to reflect upon his actions between the time he inserted his finger in the victim's vagina and the commission of the first rape. During this interval, defendant (1) began to play with the victim's chest[,] (2) put his gun on the back seat[,] (3) pulled the victim's legs around his shoulders and, finally, (4) forced his penis inside her vagina. A reasonable trier of fact could have found the defendant had adequate opportunity for reflection between these sex acts and that the acts therefore occurred on separate occasions for purposes of application of [Penal Code] section 667.6, subdivision (d)." (*Id*. at pp. 1092-1093.)

In so concluding, we cited *People v. Plaza* (1995) 41 Cal.App.4th 377, in which the Court of Appeal affirmed the trial court's finding that five sexual assaults occurred on

"separate occasions" even though all of the acts took place in the victim's apartment; the court explained that while the defendant's physical assault never ended, there were sufficient breaks in his "assaultive *sexual* behavior" to support the trial court's finding. (*Id*. at pp. 384-385; see also *People v. King* (2010) 183 Cal.App.4th 1281, 1325-1326 [the defendant, who sexually assaulted the victim on the side of the road, "momentarily paused to look around uneasily" when a car drove by, and then resumed his sexual assault by committing a "separate assaultive act"].)

However, where there are no such breaks in the assaultive sexual conduct, the mere changing of sexual positions will not suffice to support a separate occasion finding. In *People v. Pena* (1992) 7 Cal.App.4th 1294, the Court of Appeal reversed the trial court's finding that a forcible rape and oral copulation occurred on separate occasions, explaining: "[N]othing in the record before this court indicates any appreciable interval 'between' the rape and oral copulation. After the rape, appellant simply flipped the victim over and orally copulated her. The assault here was also continuous. Appellant simply did not cease his sexually assaultive behavior, and, therefore, could not have 'resumed' sexually assaultive behavior." (*Id*. at p. 1316; see also *People v. Corona* (1988) 206 Cal.App.3d 13, 18 [reversing trial court's separate occasion finding where there was "no evidence of any interval 'between' . . . sex crimes affording a reasonable opportunity for reflection; there was no cessation of sexually assaultive behavior hence defendant did not 'resume[] sexually assaultive behavior[]']).

Here, after taking photographs or videos of N.'s body with his cell phone, defendant began touching and kissing her and then forced her to orally copulate him (Count 1). Then, at defendant's direction, N. lay down on the couch and he orally copulated her (Count 2). While still on the couch, defendant put his fingers inside N.'s vagina (Count 3). Defendant then inserted his penis inside her vagina and engaged in sexual intercourse with her (Count 4). While defendant raped N., he told her she was

"gay" and that it was her husband's fault he was raping her, adding that her husband "refused something" and he was "taking revenge." N. could not estimate how long defendant raped her the first time, but at some point he stopped, told her to stand up, and took more pictures of her with his cell phone. N. then acceded to another demand to orally copulate him (Count 5). After N. did so, defendant said he was "not enjoying" the position in which he had been raping her and told her to bend over the couch. N. again complied. Defendant then assaulted her in that position (Count 6). Counts 1 through 4 were committed on the same occasion. Defendant's sexually assaultive conduct did not cease during his commission of these offenses. However, it did cease between Counts 4 and 5, and again between Counts 5 and 6. Thus, Penal Code section 667.6, subdivision (d), required full-term consecutive sentences for Counts 5 and 6, but not for Counts 1 through 4.

Nevertheless, we need not remand for resentencing because the trial court also indicated it would have exercised its discretion in imposing such sentences under Penal Code section 667.6, subdivision (c). This subdivision provides, "a full, separate, and consecutive term *may* be imposed for each violation of subdivision (e) if the crimes involve the same victim *on the same occasion*." (Pen. Code, § 667.6, subd. (c), italics added.) Here, the trial court specifically stated: "I adopt the determination that full-term consecutive sentences pursuant to Penal Code section 667.6(c) due to the defendant's repeated acts involving great violence, great bodily harm, the threat of great bodily harm or acts disclosing a high degree of cruelty, viciousness or callousness are warranted pursuant to California Rule of Court 4.421(a)(1)." Thus, while the trial court erred in concluding full-term consecutive sentences were required by Penal Code section 667.6, subdivision (d), it also properly exercised its discretion in imposing such terms under subdivision (c) of this section.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
BLEASE, Acting P. J.

/s/
MAURO, J.